DowLohnes

April 16, 2010

VIA ELECTRONIC FILING

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of *Ex Parte* Communication
MB Docket Nos. 06-121 and 02-277
MM Docket Nos. 01-235, 01-317, and 00-244

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that yesterday, George L. Mahoney, Vice President, Secretary, and General Counsel of Media General, Inc. ("Media General"), and I met with Sherrese Smith, Legal Advisor for Media, Consumer and Enforcement Issues to Chairman Julius Genachowski, to discuss the positions that Media General took and the arguments that it set forth in the Opposition to Petition for Reconsideration that it filed on May 6, 2008, in the above-referenced dockets. A copy of the Opposition was provided at the meeting along with an excerpt from the *Congressional Record*. Copies of both are included with this filing.

Mr. Mahoney also discussed the receipt earlier this week by Media General's *Bristol Herald-Courier* of a Pulitzer Prize for public service for its reporting on the mismanagement of natural gas royalties owed to thousands of Virginia landlords. In the Tri-Cities, TN/VA Designated Market Area where the newspaper is located, Media General also owns WJHL(TV) in Johnson City, Tennessee. Mr. Mahoney explained that the *Bristol Herald-Courier*, as a small newspaper in a small town, only has seven reporters in its newsroom covering parts of Virginia and Tennessee that altogether equal the size of Connecticut. The reporter who wrote the Pulitzer Prize-winning eight-part series worked on the story for over a year. Mr. Mahoney explained that, because of cross-ownership and the greater resources it allows Media General to bring to local news coverage in a market, this small newspaper was able to dedicate such intensive efforts to development of one particular series. This Pulitzer Prize is the company's seventh.

As required by Section 1.1206(b), as modified by the policies applicable to electronic filings, one electronic copy of this letter is being submitted for each above-referenced docket.

Very truly yours,

M. Anne Swanson

Attachment
cc w/attach. (by email):
Sherrese Smith, Esquire

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate to Build on Earlier Studies	)	MB Docket No. 04-228
	)	
Public Interest Obligations of TV Broadcast Licensees	)	MM Docket No. 99-360

OPPOSITION TO PETITION FOR RECONSIDERATION

MEDIA GENERAL, INC.

John R. Feore, Jr.
M. Anne Swanson
Daniel A. Kirkpatrick

Dow Lohnes PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036-6802
(202) 776-2534

Its Attorneys

May 6, 2008

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SUMMARY

Objectors have filed an untimely request for Commission reconsideration of the permanent waivers that the FCC issued, grandfathering four Media General cross-ownerships as part of the FCC's decision in the 2006 Quadrennial Regulatory Review and *Prometheus* remand ("*2008 Decision*"). The waivers were clearly "non-rulemaking" actions even though they were issued in the context of a rulemaking proceeding. As explained herein, the FCC rules make unmistakably clear that, in exactly this situation, reconsideration petitions were due within 30 days of the February 4, 2008 release date of the *2008 Decision*. Objectors submitted their reconsideration request 19 days beyond that deadline, instead filing it 30 days after notice of the *2008 Decision* appeared in the Federal Register. While such submission was timely for the rulemaking portion of the *2008 Decision*, it was fatally late for the non-rulemaking aspects, like the waivers grandfathering Media General's cross-ownerships. The FCC cannot overlook this error since the 30-day deadline is statutory, and the Objectors' failure cannot be traced to any mistake on the FCC's part in giving notice.

In any event, Objectors' attack on the permanent waivers grandfathering the Media General cross-ownerships fails to demonstrate flaws in the FCC's analytic approach or the FCC's application of that analysis to the facts. Media General's cross-ownerships were legally established pursuant to footnote 25 of the 1975 decision adopting the original newspaper/broadcast cross-ownership rule. In deciding in this case to grandfather Media General's legitimate cross-ownerships, the FCC applied the same public interest calculus it used in grandfathering combinations in 1975, an analysis the Supreme Court affirmed. As the Court recognized, in potential divestiture situations, as opposed to the application of a prospective prohibition, "a mere hoped-for gain in diversity is not enough." Instead, as the Court said was appropriate in 1975, the FCC in this case rightly factored concerns like program service,

stability, and continuity of ownership into account. The FCC then noted examples of extensive public service delivered by the four cross-ownerships, examples supported by literally volumes of facts in the record. Objectors attack the FCC for providing inadequate evidence of any harm that would result from divestiture, wholly ignoring the extensive evidence in the record of the financial challenges faced by today's media, particularly newspapers. In any event, as the Supreme Court affirmed in just this context, such factual determinations or predictive judgments regarding harm are based on the expert knowledge of the agency and "complete factual support . . . is not possible or required."

Objectors contend that the FCC's grandfathering analysis strayed impermissibly from the waiver approach set forth in the *2008 Decision* or the one utilized by the FCC in the four permanent waivers of the newspaper/broadcast cross-ownership rule issued prior to the 2006 Quadrennial Review. The first claim ignores that the new rules are not yet effective and that other public interest challengers have argued the *2008 Decision* is stayed by the Third Circuit's 2003 *Prometheus* decision. Second, the Objectors' challenge overlooks that the four previous permanent waivers turned on an open-ended public interest analysis, which, in the end, cannot be legally differentiated from the public interest approach the FCC applied here.

The Objectors' additional criticisms of the details of the waiver standards as a whole must give way to the unmistakable conclusion that the newspaper/broadcast cross-ownership rule should have never been retained in the first place. The *2008 Decision* fails adequately to explain why the FCC retreated from the changes it adopted in 2003, changes that were mandated by Section 202(h) of the 1996 Act. Most seriously, retention of the rule continues to work a deprivation of the constitutional rights of Media General and other newspaper owners that hold or would like to own broadcast licenses. Objectors' carping at details cannot obscure that fundamental violation, which Media General expects the courts to rectify in the future.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Dockets No. 06-121 *et al.*

OPPOSITION TO PETITION FOR RECONSIDERATION

Media General, Inc. ("Media General"), by its attorneys, hereby opposes the Petition for Reconsideration filed by seven parties on March 24, 2008,[1] asking the FCC to review and modify its *Report and Order and Order on Reconsideration*, released on February 4, 2008.[2]

As shown below, under the Communications Act and procedural rule changes adopted in 2000, the *Petition* is untimely insofar as it asks the FCC to reconsider its grant in the *2008 Decision* of permanent waivers that grandfathered cross-ownerships in four of Media General's markets. That infirmity aside, Objectors' attack on the merits ignores that the issuance of the grandfathering waivers applied the same public interest calculus that the FCC has followed in the past, and the Supreme Court has affirmed, in similarly grandfathering cross-ownerships. The FCC's application of those public interest factors to Media General's cross-ownerships was fully supported by the facts in the record. Finally, contrary to Objectors' claims, the FCC, in its *2008 Decision*, should have repealed the newspaper/broadcast cross-ownership rule in its entirety. Merely tinkering with its waiver standards, as Objectors ask, is beyond the point.

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[1] Petition for Reconsideration in MB Docket Nos. 06-121 *et. al.* (March 24, 2008) ("*Petition*"). The petitioners include Common Cause, Benton Foundation, Consumers Action, Massachusetts Consumers' Coalition, NYC Wireless, James J. Elekes, and National Hispanic Media Coalition ("Objectors").

[2] *2006 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act*, Report and Order and Order on Reconsideration, FCC 07-216 (rel. Feb 4, 2008) ("*2008 Decision*").

I. THE RECONSIDERATION PETITION IS UNTIMELY AND MUST BE DISMISSED AS IT PERTAINS TO THE PERMANENT WAIVERS THAT GRANDFATHERED MEDIA GENERAL'S CROSS OWNERSHIPS

Section 405(a) of the Communications Act requires that reconsideration petitions be submitted within 30 days of the issuance of a decision.[3] Since 2000, the Commission's rules have made unmistakably clear that, for adjudicatory decisions, including individual licensing and waiver decisions like grandfathering, the 30 days is to be measured from the date on which the Commission's decision is *released,* even when those decisions are included in a document produced as part of a rulemaking proceeding.

In this case, the *2008 Decision* was released on February 4, 2008. It included, among other determinations, grandfathering of Media General's four cross-ownerships, an adjudicatory decision clearly premised on permanent waivers of the cross-ownership rule.[4] Under the Act, the FCC's rules, and unambiguous precedent, petitions for reconsideration of such adjudicatory decisions were due on March 5, 2008, 30 days after the February 4 release. The *Petition* was not filed, however, until March 24, 2008, or 19 days after expiration of the applicable 30-day time period. As explained in this section, this tardiness leaves the Commission no choice but to dismiss the challenge to the permanent waivers that grandfathered Media General's cross-ownerships since the 30-day deadline is a statutory one.

The FCC's rules include two different provisions implementing Section 405(a)'s 30-day deadline: Section 1.106, which relates generally to reconsideration of adjudicatory matters, and Section 1.429, which pertains to reconsideration of rulemaking proceedings.[5] Both sections include virtually identical language elaborating on the filing specifics that implement

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[3] 47 U.S.C. § 405(a).

[4] *2008 Decision* at ¶ 77.

[5] 47 C.F.R. §§ 1.106 and 1.429, respectively.

Section 405(a). Both sections direct litigants to Section 1.4(b) of the FCC's rules for the mechanics of computing time deadlines.[6]

Section 1.4(b), however, differentiates between rulemaking and non-rulemaking decisions and includes a note that makes clear that petitioners in this case have submitted an untimely request. Section 1.4(b)(1) first provides that, for decisions in notice and comment rulemaking proceedings, "public notice" is defined as the date of the document's publication in the Federal Register; Section 1.4(b)(2) provides that for all non-rulemaking determinations, "public notice" means the release date of the document.[7] The note to Section 1.4(b)(1) states that "[l]icensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2)," which operates to require submission of reconsideration requests within 30 days of release of a decision.[8]

The administrative history of Section 1.4(b) further makes clear that requests for reconsideration of the grandfathering waivers that Media General received are procedurally governed by Section 1.4(b)(2) of the FCC's rules and that subsection's earlier deadline. In adopting the current rule in 2000, the FCC specifically stated that:

> [a]djudicatory matters, *e.g.,* individual licensing decisions *and waivers as to specific parties*, do not come within the scope of Section 1.4(b)(1), even if the decisions happen to be related to, or issued in, an on-going rulemaking docket.[9]

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[6] 47 C.F.R. § 1.4(b). The relevant language in Section 1.106 provides that "[t]he petition for reconsideration and any supplements thereto shall be filed within 30 days from the date of *public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules*, ..." 47 C.F.R. § 1.106(f) (emphasis supplied). Section 1.429's language is identical except that it specifies the deadline as "30 days from the date of public notice of *such* action," before referring parties to Section 1.4(b). 47 C.F.R. §§ 1.429(d) (emphasis supplied).

[7] 47 C.F.R. §§ 1.4(b)(1) & (2).

[8] 47 C.F.R. § 1.4(b)(1), Note.

[9] *Amendment of Section 1.4 of the Commission's Rules relating to Computation of Time*, Memorandum Opinion and Order, 15 FCC Rcd 9583, 9584 (2000) (emphasis supplied).

In reaching this result, the Commission explained that it was clarifying its rules to remove confusion and correct a problem that had been highlighted by the United States Court of Appeals for the District of Columbia Circuit in *Adams Telcom, Inc. v. FCC.*[10] In that decision, the court had held that, while it was reasonable for the Commission to apply different approaches to triggering time periods for seeking review of adjudicatory and non-adjudicatory orders, the FCC's rules needed to clearly specify the distinction.[11] Since 2000, Section 1.4 of the Commission's rules has made this distinction unambiguously clear so that requests for reconsideration of waivers and other non-rulemaking determinations, such as those issued to Media General, are now due 30 days after the release date of a document even if that document was issued as part of a rulemaking proceeding.

Since its 2000 clarification, the Commission has applied the new approach to dismiss several petitions for reconsideration of adjudicatory decisions made in the context of rulemaking when those petitions were not filed within 30 days of the *release date* of the rulemaking decision. In 2003, the Commission rejected portions of a petition for reconsideration related to adjudicatory matters filed by an applicant whose license applications had been dismissed as part of a broader Commission rulemaking order.[12] The Commission in that decision partially dismissed the petition for reconsideration that had been submitted within 30 days of Federal Register publication but was filed more than 30 days after the order's earlier release date, "to the extent that the petition relates to [a] particular application."[13] Later the same year, the

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[10] 997 F2d 955 (D.C. Cir. 1993).

[11] *Id.* at 957.

[12] *Amendment of the Commission's Rules Concerning Maritime Communications*, Third Memorandum Opinion and Order, 18 FCC Rcd 24391, 24397 (2003).

[13] *Id.* In that case, the Commission distinguished the petition it partially rejected from another acceptable one that separately sought reconsideration of the adjudicatory order because the latter had been filed within 30 days of the order's release date. *Id.* at 24396. The Commission also

Commission dismissed as untimely two parties' petitions for reconsideration of the adjudicatory denial of waiver requests included in a rulemaking order because again the parties filed their requests within 30 days of Federal Register publication of the rulemaking but more than 30 days after the Commission's release of the decision itself.[14]

In this case, the reconsideration petition was likewise filed within 30 days of publication of the *2008 Decision* in the Federal Register but not within 30 days of the release of the *2008 Decision*. It was filed 49 days after that release. As a result, the Commission's rules clearly require dismissal of the *Petition* to the extent that it requests reconsideration of the adjudicatory decision grandfathering Media General's cross-ownerships. The Commission does not have discretion to waive the 30-day filing requirement set forth in Section 405(a) of the Act unless "a procedural violation by the Commission" has made it "impossible reasonably for the party to comply with the filing statute."[15] The only occasions when the Commission has waived Section 405(a)'s timing requirements have been when the Commission itself failed to provide adequate notice of its decision, thereby preventing the party seeking reconsideration from receiving actual notice of the decision in a timely manner.[16]

In a proceeding as highly publicized as this, it is inconceivable that Objectors did not receive actual notice of release of the *2008 Decision* in time to submit a timely petition. Objectors have not even attempted to plead exceptional circumstances, nor is it likely that they

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dismissed a curiously styled "Erratum Petition" of its adjudicatory decisions that was filed more than 30 days after release of the order. *Id.* at 24397.

[14] *ACR Electronics, Inc. and McMurdo Limited*, Order on Reconsideration, 18 FCC Rcd 11000, 11001 (2003).

[15] *Gardner v.* FCC, 530 F2d 1086, 1091-1092 n.24 (D.C. Cir. 1976).

[16] *Id.* at 1091-1092. *Winbeam, Inc.*, 20 FCC Rcd 8741, 8745 (2005); *Gary E. Stoffer*, 13 FCC Rcd 14056, 14058-59 (1998). *See also Virgin Islands Telephone Corp. v FCC*, 989 F2d 1231 (D.C. Cir. 1993); *Reuters, Ltd. v. FCC*, 781 F2d 946, 951-952 (D.C. Cir. 1986).

could. Accordingly, the Commission must dismiss the *Petition* as it relates to the permanent waivers grandfathering Media General's four cross-ownerships.

II. THE FCC'S DECISION TO GRANDFATHER FOUR MEDIA GENERAL CROSS-OWNERSHIPS, SIMILAR TO THE AGENCY'S 1975 DETERMINATIONS FOR OTHER COMBINATIONS, WAS BOTH IN THE PUBLIC INTEREST AND WITHIN ITS ADMINISTRATIVE DISCRETION

In the *Petition*, Objectors challenge the FCC's decision to grandfather four Media General cross-ownerships, granting them permanent waivers of the cross-ownership rule and doing so, as the FCC said, "in the same manner as the Commission did in 1975."[17] They contend that the FCC applied the wrong legal test and instead should have discussed the "four-factor" test it has followed in permanently waiving the cross-ownership rule for proposed cross-ownerships or the waiver tests announced as part of the *2008 Decision.* Objectors also argue that the FCC provided inadequate factual justification for its result.[18]

Objectors' contention that the grandfathering was improper seems to be based, in part, on their insinuations that these combinations were improperly formed and lacked a *bona fide* basis for their existence. Their arguments ignore that, at root, the touchstone for whether cross-ownerships should continue is whether they serve the "public interest," something that the FCC here analyzed in a manner entirely consistent with its own and court precedent. Contrary to Objectors' arguments, the FCC applied the correct analysis, as shown in this section. Further, its application of that analysis was fully supported by record facts, as discussed in the next section.

In 1975, the FCC not only adopted the cross-ownership ban, but the agency had to address how to apply that rule change to legally established combinations. The prospective rule had been adopted despite the fact that no claim had been made that "newspaper-television station owners [had] committed any specific non-competitive acts" and that the FCC's own review of

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[17] *2008 Decision* at ¶ 77.

[18] *Petition* at 7-11.

the effect of newspaper ownership on television advertising rates "fail[ed] to show an effect on rates attributable to newspaper ownership."[19] The agency also noted that it could not ascertain any "basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership."[20] Rather, it adopted the cross-ownership rule solely because "[w]e think that any new licensing should be expected to add to local diversity."[21] The United States Supreme Court, in affirming the FCC's ban, commented on the "inconclusiveness of the rulemaking record,"[22] noting that the FCC "did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily 'speak with one voice' or are harmful to competition."[23] The Supreme Court, nonetheless, found that the FCC's decision to give controlling weight to the "goal" of diversification in shaping the *prospective* rules was a "reasonable administrative response" and that diversification was a justifiable public interest goal on which to ground the new prospective rules.[24]

When it came time to analyze the grandfathering of existing combinations, however, the FCC, as affirmed by the Supreme Court, utilized a different and broader public interest calculus, one in which "a mere hoped-for gain in diversity is not enough."[25] In its adjudicatory

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[19] *Amendment of Section 73.34 [sic], 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046, 1072-73 ("*1975 R&O*"), *recon.* 53 FCC 2d 589 (1975), *modified by Nat'l Citizens Committee for Broad. v. FCC,* 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part, FCC v. Nat'l Citizens Committee for Broad.*, 436 U.S. 775 (1978) ("*NCCB*").

[20] *1975 R&O* at 1075.

[21] *Id.*

[22] *NCCB,* 436 U.S. at 796.

[23] *Id.* at 786. In the intermediate appeal, even the D.C. Circuit, which thought the FCC had not gone far enough in applying the restriction to existing combinations, acknowledged that the FCC had adopted the ban "without compiling a substantial record of tangible harm" and that the record included "little reliable 'hard' information." *NCCB v. FCC*, 555 F.2d at 944,956.

[24] *NCCB,* 436 U.S. at 795-97.

[25] *1975 R&O,* 50 FCC 2d at 1078.

grandfathering decisions, the FCC said it would examine additional considerations "relevant under our broad public interest mandate"[26] and explained that "[i]n our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued . . . . Particularly in connection with a number of entities, there is a long record of service to the public."[27] In this review, the FCC noted that "[a]scertaining and endeavoring to serve local needs was the key point, and some standard had to be developed to indicate where this was a reasonable expectation and where it was not."[28]

The Supreme Court affirmed the FCC's approach, which did not simply give controlling weight to diversity:

> the weighing of policies under the "public interest" standard is a test that Congress has delegated to the Commission in the first instance, and we are unable to find anything in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to "presume" that its diversification policy should be given controlling weight in all circumstances.[29]

The Court indicated that such an analysis, focused only on diversification, would be inconsistent with other policies emphasizing local service. It approvingly noted that the FCC, in the renewal context, had made clear that "diversification . . . [is] a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing."[30] Rejecting the Court of Appeals' call for total divestiture, the Supreme Court stated that the FCC had rightly factored concerns like stability and continuity of ownership into its public interest analysis of grandfathering and that the FCC had not "acted irrationally in concluding that these public interest harms outweighed the potential gains that

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[26] *Id.* at 1080.

[27] *Id.* at 1078.

[28] *Id.* at 1081.

[29] *NCCB,* 436 U.S. at 810.

[30] *Id.*

would follow from increasing diversification."[31] Based on this approach, the FCC grandfathered all but "egregious" combinations, which included the television stations owned by the local newspapers which were the only electronic outlets of their kind in the community.

In granting permanent waivers grandfathering the Media General cross-ownerships, the FCC used the same calculus, analyzing a number of public interest concerns. The FCC first noted that these combinations consisted of but a single broadcast station and newspaper.[32] In addition, not allowing these combinations to continue would have created the same type of disruption that had concerned the FCC and the Supreme Court in the 1970s.[33] The FCC found that this adjudicatory decision was premised on five public interest concerns that echoed the Supreme Court's affirmance of the FCC's 1975 grandfathering determinations:

> Specifically, in the following cases, we have determined that the public interest warrants a waiver in light of the synergies that have already been achieved from the newspaper/broadcast station combination, the new services provided to local communities by the combination, the harms . . . associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver request has been pending . . . .[34]

This emphasis on proven service to local communities and the FCC's public interest in maintaining it was wholly consistent with the approach affirmed by the Supreme Court when it reviewed the *1975 R&O*.

Objectors attempt to establish that the Media General situation is somehow inapposite from what was before the Commission in 1975, arguing that then there were many more combinations and attempting to imply that Media General formed the cross-ownerships with "unclean hands" -- "they held broadcast licenses in full knowledge that the FCC's rules prohibited such combinations and that they would be required to divest before license

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[31] *Id.* at 804-05.

[32] *2008 Decision* at ¶ 77.

[33] *Id.*

[34] *Id.* (footnote omitted).

renewal."[35] This suggestion that Media General's combinations were illegally formed is wholly mistaken. Each combination was created when a television licensee acquired a newspaper, a practice permitted under footnote 25 of the *1975 R&O* itself and allowed to continue for "1 year or . . . [until] the time of the next renewal date, whichever is longer."[36] Objectors have consistently opposed any cross-ownership, calling in the comment period for no liberalization to the rule.[37] They also have made clear their dislike of footnote 25, calling now on reconsideration for a change in the legitimate process that the FCC established decades ago to address acquisitions of newspapers over which it lacks jurisdiction.[38] Objectors' predilections, however, cannot de-legitimize Media General's reliance on established FCC procedures or diminish the propriety of Media General's legally established combinations.[39] The FCC's decision now, in the context of the larger rulemaking, to issue permanent waivers that grandfathered Media General's four legitimately formed combinations was fully consistent with the FCC's earlier public interest calculus and well within its discretion.

Objectors' attempt to demonstrate that the FCC incorrectly ignored the "four-factor" test that had been utilized in four earlier permanent waiver cases mistakenly overlooks that this test, if even Objectors succeed in showing it should apply, incorporates many of the same public interest indicia that the FCC applied in the adjudicatory relief that it provided to Media General.

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[35] *Petition* at 9 n.29.

[36] *1975 R&O* at 1076 n.25.

[37] *E.g.,* Comments of Office of Communication of United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause and Benton Foundation in MB Docket Nos. 06-121, *et. al.* (Oct. 23, 2006) at 60-73.

[38] *Petition* at 6-7.

[39] "[W]hen it established the cross-ownership rules, the Commission expressly contemplated waivers of newly created combinations brought about through a television licensee purchasing a daily newspaper. *Second Report and Order*, 50 FCC Rcd 1046, 1076 n.25 (1975), *aff'd sub nom., FCC v. NCCB,* 436 U.S. 775 . . . ." *Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1041 n.4 (D.C. Cir. 1987).

This "four-factor" test provides for alternative circumstances in which waivers may be warranted:

> (1) where a licensee is unable to sell a station; (2) where the only sale possible would be at an artificially depressed price; (3) where separate ownership and operation of the newspaper and the broadcast station could not be supported in the locality; or (4) *where, for whatever reason, the purposes of the rule would be disserved by its application.*[40]

While the test includes three very specific criteria focused on financial difficulty, the fourth alternative is much broader and specifically calls for a public interest review. Prior to this 2006 Quadrennial Review, the FCC had granted four permanent waivers of the cross-ownership rule; all of them under the fourth "public interest" criterion.[41] In making evaluations under this fourth "public interest" criterion, the FCC will consider any "special circumstances" advanced by a party as having a bearing on the appropriateness of granting a waiver.[42]

This emphasis in the fourth alternative on the "public interest" with respect to determining "where, for whatever reason, the purposes of the rule would be disserved by its application" is exactly what the FCC did in this case when it followed the 1975 grandfathering approach. As the United States Court of Appeals for the Third Circuit recognized almost four years ago in addressing the policy goals related to the rule, newspaper/broadcast combinations can promote localism, and a blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity.[43] On remand, in grandfathering Media General's cross-

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[40] *Kortes Communications, Inc.*, 15 FCC Rcd 11846, 11851 (2000) (emphasis supplied).

[41] *Id. Columbia Montour Broadcasting Co., Inc.*, 13 FCC Rcd 13007, 13012-13 (1998); *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5349-50 (1993), *aff'd sub nom Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995); *Field Communications Corp.*, 65 FCC 2d 959, 960-61 (1977).

[42] *Kortes*, 15 FCC Rcd at 11851.

[43] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-400 (3d Cir. 2004) ("*Prometheus*"), *cert. denied, Media General, Inc. v. FCC*, 545 U.S. 1123 (2005). Although this decade began with the FCC citing "competition" as one of the goals to be served by the newspaper/broadcast cross-ownership rule, the *Prometheus* court noted that the FCC, in modifying the cross-ownership rule in 2003, had determined that the ban was no longer necessary to promote

ownerships, the FCC took these localism and diversity conclusions into account. The FCC noted that it based its determination that grandfathering was warranted on synergies and new services the Media General cross-owned properties had brought to their local markets. The FCC highlighted these conclusions with illustrative facts from the record, examples amply backed up by literally volumes of factual support that Media General had submitted in the rulemaking record.[44] The FCC's cited examples recounted the localism benefits of the combinations; they also showed why prohibiting the Media General cross-ownerships was not necessary to protect diversity because they documented how the flow of information to the licensee communities had increased vastly through cross-ownership and marketplace changes. Then -- certainly in keeping with the "for whatever reason" language from the terms of the fourth criterion -- the FCC added that grandfathering these four combinations on a permanent basis was warranted by "the harms . . . associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver request has been pending," also harkening back to the 1975 analytic approach.[45]

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competition in local markets. The FCC had found most advertisers do not view newspapers and television stations as close substitutes and that no party challenged this finding on appeal. *Id.* at 398. In the *2008 Decision*, the FCC stated that it no longer believes that the rule is needed to ensure competition in *any* relevant product market. *2008 Decision* at 23 n.131 (emphasis supplied).

[44] *2008 Decision* at ¶ 77. *See* Section III *infra*.

[45] *2008 Decision* at ¶ 77. Objectors briefly contend, *Petition* at 8, that the FCC failed to apply the *2008 Decision*'s new waiver criteria in grandfathering the combinations. First, this contention overlooks that the new standards are not yet effective. *See, e.g., Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 73 Fed. Reg. 15156 (2008) (seeking OMB consent on forms necessary to implement newspaper/broadcast cross-ownership changes); *2008 Decision* at ¶ 155. Second, the argument is totally inconsistent with other public interest parties' contentions in a separately filed collateral attack on this same action that effectiveness of the *2008 Decision* has been stayed by the Third Circuit in *Prometheus*. *See Application for Renewal of License of WJHL-TV, Johnson City, Tennessee, BRCT-20050401BYS, et. seq.*, Application for Review of Free Press and NAACP (Apr. 24, 2008) at 17. It cannot be stayed there and operative here. If the new criteria were operative, Media General would be required to defeat the negative presumption that would apply because of market size by demonstrating satisfactory levels of concentration,

Thus, the FCC's rationale to support its permanent waivers grandfathering Media General's four cross-ownerships was, contrary to Objectors' contentions, clearly consistent with past precedent -- whether it be the *1975 R&O* or the "public interest" criterion utilized in the four subsequent instances in which the FCC has granted permanent waivers. The FCC has "wide" discretion both in how it analytically makes decisions, like waivers that grandfather and affect licensing, and in the predictive judgments supporting its waiver decisions.[46] The logic with which it approached Media General's situation was grounded in both precedent and rationality. Objectors' dislike of the outcome is not accompanied by any proffered reason to change it.

III. THE FACTS IN THE RULEMAKING RECORD FULLY SUPPORT THE ADJUDICATORY DECISION TO GRANDFATHER MEDIA GENERAL'S FOUR CROSS-OWNERSHIPS

In explaining the grandfathering which Objectors oppose, the FCC cited to increased public interest benefits Media General's cross-ownerships have rendered in each of their four markets. While providing the highlights, the *2008 Decision* in no way did justice to the extensive recitation of benefits Media General has supplied during the last six and one-half years this proceeding and its predecessors have been open before the FCC.

First and foremost, three of the four combinations at issue deliver appreciably more local news and public affairs programming than they were offering prior to cross-ownership. WJHL-TV in Johnson City, Tennessee, has increased its local news and public affairs by seven and one-half hours per week; WRBL(TV) in Columbus, Georgia, offers an additional five hours; and

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increased local news, continued independent news judgment at the outlets, and need for financial relief. The same synergies and increased local news offerings, combined with the evidence Media General supplied in comments on the lack of any competitive harm, its outlets' independence in decisionmaking, and the adverse financial conditions facing media outlets would be sufficient to warrant a waiver under even the new standards which other public interest parties claim in another pleading are not yet in effect.

[46] *NCCB*, 436 U.S. at 813-814; *Ellis v. Tribune Television Co.*, 443 F3d 71, 73 (2nd Cir. 2006).

WMBB(TV) in Panama City, Florida, increased its total by 30 minutes a week.[47] In the one exception, WBTW(TV) in Florence, South Carolina, the station was already delivering the most local news of all the new cross-owned stations at the time Media General acquired it; there, the news total has simply remained the same, although the station has added an additional half-hour of public affairs programming each week.[48] Thus, WBTW(TV)'s overall total of local news and public affairs programming has increased since convergence began. All four stations increased their news and public affairs programming since Media General acquired them.

While the FCC cited several additional specifics on each of the Media General stations, the record is replete with examples of how, working together, the co-owned newspaper and television station in each market have been able to cover more breaking news stories, report on more diverse ideas from different sources, investigate governmental and institutional abuse, and deliver more emergency weather coverage than they could each have done acting alone. While Objectors call the examples "self-serving," *Petition* at 10, the volumes of facts belie the claim.

WJHL-TV, in particular, has been able to increase its political coverage and electoral reporting in the Tri-Cities, TN-VA DMA since it became a cross-owned outlet. Examples in the record have included:

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[47] As noted in Media General's comments, the news totals are as follows:

Station	Prior to Convergence	Fall 2006	Increase
WJHL-TV (Tri-Cities)	18 hrs, 47½ mins	26 hrs, 17½ mins	7 hrs, 30 mins
WRBL(TV) (Columbus)	16 hrs, 45 mins	21 hrs, 45 mins	5 hrs
WMBB(TV) (Panama City)	20 hrs, 15 mins	20 hrs, 45 mins	30 mins

Comments of Media General in MB Docket No. 06-121 (Oct. 23, 2006) ("*Comments*"), Vol. 2, Statement of Adam Clayton Powell, III ("*Powell*"), at Exhibit C, p. 4 and Tab 1 (WJHL-TV); Exhibit E, p. 4 and Tab 1 (WRBL(TV)); Exhibit F, p. 4 and Tab 1 (WMBB(TV)).

[48] The news totals for the station are as follows:

Station	Prior to Convergence	Fall 2006
WBTW(TV)	20 hrs, 30 mins	20 hrs, 30 mins

Powell at Exhibit D, p. 4 and Tab 1.

-- Three-day series of live reports on opening of Tennessee legislature with reporting and analysis from WJHL-TV and reporters from the co-owned *Bristol Herald Courier*. (*Powell*, Exhibit C at 6)

-- Coverage of Virginia Governor Tim Kaine's 2006 inauguration; the station and paper shared reporting; print reporters appeared in on-air segments. (*Powell*, Exhibit C at 6-7)

-- Questionnaires sent by *Herald Courier* to candidates before elections; answers reported in print, on-air, and on-line. (*Powell*, Exhibit C at 7)

-- Station's pre-election profiles of candidates -- in 2006 TN state primary and local general elections, WJHL-TV broadcast profiles of all candidates in 9 races -- included interviews with *Herald Courier* reporters with specialized knowledge and long-time contacts. (*Powell*, Exhibit C at 7-8)

-- Similar pre-election profiles for November 2005 Virginia general elections. (*Powell*, Exhibit C at 8)

-- WJHL-TV's special reports on candidates, issues, and voting process in the 2004 primary elections included much deeper coverage of Virginia subjects because of station's access to *Herald Courier* reporters. (*Powell*, Exhibit C at 9)

-- Expanded election night coverage -- access to *Herald Courier* and WJHL-TV reporters allowed station to provide results and deeper analysis much more quickly. (*Powell*, Exhibit C at 7-10)

In the *2008 Decision*, the FCC referred to the fact that the reporting of WBTW(TV) in Florence, South Carolina has benefited from relying on its co-owned newspaper's archives and support in preparing special and investigative pieces. Examples in the record have included:

-- Station's 2004 special report on fifty-year anniversary of *Brown v. Board of Education*, using extensive archival information from the *Morning News*. (*Powell*, Exhibit D at 8)

-- WBTW(TV) report on hurricane dangers in locally produced "Storms of the Century" relied on *Morning News* archives. (*Powell*, Exhibit D at 7)

-- Hurricane coverage -- WBTW(TV) and the *Morning News* work together each year to produce a hurricane guide, which is distributed in print copies of the newspaper and available at the station and on-line. (*Powell*, Exhibit D at 5-6)

-- Extended coverage of the planning and construction of Interstate 73, proposed route from Michigan to SC coast -- In 2004 reporters traveled to Washington together to report on lobbying efforts to increase funding. Presence of reporters from both outlets allowed increased sourcing. (*Powell*, Exhibit D at 8) WBTW(TV), *Morning News*, and local public TV station in 2004 and 2005 held three "town hall" meetings

on the proposed highway; WBTW(TV) provided on-air coverage. (*Powell*, Exhibit D at 8)

-- Combined efforts by reporters for both outlets led to eventual release of a videotape of incident in which Dillon, SC police officers were accused of using racially offensive language. (*Powell*, Exhibit D at 9)

For WRBL(TV) in Columbus, Georgia, the *2008 Decision* noted that, through convergence, the station is better able to cover the western half of its DMA due to the broadcast bureau it has established and staffed in the newspaper's building approximately 30 miles to the west. As the comments repeatedly showed, the station's collaboration with newspaper reporters to the west has, at the same time, freed up some of the station's own reporters to provide expanded coverage of the eastern DMA. Examples in the record include:

-- Breaking news coverage greatly improved through tips -- March 2005 WRBL(TV) tipped off by newspaper reporter to explosion at a factory in Lanett. WRBL(TV) was first in DMA to report this on-air; *Opelika-Auburn News* followed up with independently produced story next day. (*Powell*, Exhibit E at 5-6)

-- February 2005, *Opelika-Auburn News* reporter broke story of a lawsuit alleging abuse of students at local military academy -- WRBL(TV) reporter followed up with additional reporting and interviews. Reporters from both outlets collaborated on continuing coverage as the story developed. (*Powell*, Exhibit E at 6)

-- February 2005 coverage of story that dismissal of Auburn University athletics personnel was racially motivated -- *Opelika-Auburn News* reporter was the only person able to obtain an interview with the person making the allegations and shared this information with WRBL(TV). (*Powell*, Exhibit E at 6-7)

-- 2006 story of legitimacy of grades given to Auburn University football players -- WRBL(TV) reporters conducted interviews and provided information to newspaper reporters, who used it to supplement their own reporting. (*Powell*, Exhibit E at 7)

-- Coverage of federal environmental trial in eastern Alabama -- WRBL(TV) reporter attended morning sessions and reported in evening news; newspaper reporter attended in afternoon. The reporters shared their notes and research. (*Comments* at 19)

-- "State of Secrecy" series -- in consultation with Alabama Council for Open Government, the two outlets investigated and reported on openness and accountability of government records in many of DMA's small towns and municipalities. Newspaper reporters investigated the Alabama counties, and WRBL(TV)'s reporters investigated those in Georgia. Together, they provided a comprehensive regional review and comparison. WRBL(TV) broadcast two days of on-air; newspaper had five-day series of reports. (*Powell*, Exhibit E at 10)

Finally, as the *2008 Decision* noted, WMBB(TV) in Panama City, Florida, a station in Media General's smallest cross-owned market (DMA # 154), through convergence, has been able to increase its hurricane coverage, political forums, and investigative reporting. Examples in the record include:

-- Hurricane coverage -- WMBB is located on the coast, while the co-owned *Floridan* is located more to the north and inland. During Hurricane Denis in 2005, WMBB stationed a reporter in the *Floridan*'s newsroom and broadcast live reports as part of its wall-to-wall coverage, including interviews with emergency management officials. With this second base in the northern part of the DMA, the station could provide much more information on evacuation routes and particular dangers, such as tornadoes, faced by residents in that part of the DMA. Similar efforts occurred in 2004 for Ivan and other serious hurricanes. (*Powell*, Exhibit F at 5-9)

-- Election night coverage -- access to both outlets' reporters allows each to cover more races in greater depth, particularly in this market where television station and newspaper serve different parts of the DMA. (*Powell*, Exhibit F at 12-13)

-- In 2004, the outlets teamed up on investigation of a group that had purchased highly critical print and TV advertisements related to a candidate for state's attorney. WMBB(TV) obtained documents, and *Floridan* reporter with expertise in fundraising records analyzed them. (*Powell*, Exhibit F at 13-15)

-- Outlets worked together to overcome governmental officials' resistance to investigate and report on story regarding allegations of sexual misconduct involving a young girl that was levied against a Jackson County sheriff's deputy. (*Powell*, Exhibit F at 15)

-- 2002 -- WMBB(TV) received "tip" that local officials were investigating a local school for troubled boys and shared it with *Floridan*, which was able to use extensive contacts to determine investigation's status. (*Powell*, Exhibit F at 16)

-- 2002 -- WMBB(TV) worked with *Floridan* and papers in Dothan, AL DMA to research and present special reports on controversial proposal for Interstate connector. (*Powell*, Exhibit F at 16)

Objectors also criticized the *2008 Decision* for failing to provide any specific harms that would be caused by forced divestiture, harms that would undoubtedly be exacerbated by the prolonged nature of this proceeding and the length of cross-ownership, concerns which the FCC cites and Objectors say are irrelevant. In the late 1970s, the FCC's 1975 grandfathering decision came under similar attack. The Supreme Court, however, in affirming the FCC's analytical approach to divestiture and its factual evaluations, found that such specificity was not required:

> The Court of Appeals' final basis for concluding that the Commission acted arbitrarily in not giving controlling weight to its divestiture policy was that the Court's finding that the rulemaking record did not adequately "disclose the extent to which divestiture would actually threaten" the competing policies relied upon by the Commission . . . . However, to the extent that factual determinations were involved in the Commission's decision to "grandfather" most existing combinations, they were primarily of a judgmental or predictive nature . . . . In such circumstances, complete factual support in the record for the Commission's judgment or prediction is not possible or required: "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."[49]

In this instance, the FCC's factual determinations or predictions regarding potential harms are entitled to the same deference and clearly should not be disturbed on reconsideration.

IV. THE FCC MISTAKENLY MADE ONLY THE MOST MODEST OF CHANGES TO ITS NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE AND SHOULD HAVE ELIMINATED IT ENTIRELY

While Objectors make suggestions as to how the *2008 Decision* can be made more regulatory in certain specifics,[50] Media General submits that the FCC erred, as a matter of statutory and constitutional law, in not completely eliminating the newspaper/broadcast cross-ownership rule in all markets. The waiver procedures that the FCC merely grafted onto the former rule, which it retained in its entirety, are not only impermissibly narrow in scope and specifics but the criteria set forth for waiving future combinations are based on legally discredited FCC models. Rather than make minor modifications to the changes that the FCC did adopt in the *2008 Decision*, the agency should repeal the newspaper/broadcast cross-ownership rule and the recent standards it has added to it for at least four reasons, which were more fully developed in the record.[51]

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[49] *NCCB*, 436 U.S. at 813-14.

[50] *Petition* at 2-7.

[51] *See, e.g.*, Comments of Media General in MB Docket Nos. 06-121, *et al.* (Dec. 11, 2007) at 1-24 ("*MG Dec. 11, 2007 Comments*"); *Comments* at 66-98; Comments of Media General in MB Docket Nos. 02-277, *et al.* (Jan. 2, 2003) at 25-75; Comments of Media General in MM Docket Nos. 01-235 and 96-197 (Dec. 3, 2001) at 18-86.

First, the FCC already found in 2003, and the United States Court of Appeals for the Third Circuit agreed in 2004, that the former rule was not necessary to fulfill the FCC's interest in promoting competition, localism, or diversity, and that it counterproductively harmed localism. The FCC found repeal mandated by Section 202(h) of the 1996 Telecommunications Act, and the court agreed.[52]

The *Prometheus* court "sum[med] up" the standard of review that it would apply in any future evaluation of the FCC's actions: "In a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified."[53] The *2008 Decision* does an inadequate job of addressing the lack on remand of any credible evidence showing that the former rule remains "useful" or that any need remains under Section 202(h) to substitute somewhat lessened regulation, such as adopted in the *2008 Decision*, for the previous rule. The FCC and the court already found the earlier rule was unnecessary to advance competition or localism, and the ever-growing abundance of sources of news and information, particularly local, should have mooted any further FCC concern over "diversity." Given that review has now become quadrennial, the FCC's statutory burden to ensure that its rules keep pace with marketplace realities is that much stronger. The *2008 Decision* did not establish, nor could it, that any trends suggest a future decrease in abundance that somehow warrants four more years of regulation.

Long-established administrative law precedents equally compelled total repeal. The FCC itself acknowledged in 1975 that there was no evidence of a competitive harm mandating the former rule; the speculative "hoped-for" gain in diversity upon which it has premised has never

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[52] *Prometheus*, 373 F.3d at 398-400, *citing 2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd at 13749, 13754, 13764-66 (2003).

[53] *Prometheus*, 373 F.3d at 395.

materialized. This time around, the FCC thus had no legal choice but to repeal the former rule. A regulation reasonable in the face of a problem becomes highly capricious when the problem is shown no longer to exist.[54]

In fact, the FCC's abrupt change of course in 2008, which, as the Chairman acknowledged, decreased cross-ownership regulation much less and in fewer markets than had been done with the cross-media limits in 2003, similarly violated administrative law precedent. Such a change in course requires clear and compelling evidentiary support and a detailed and persuasive explanation for reversing direction.[55] The *2008 Decision* does an inadequate job of explaining why the record warranted a more conservative approach than it had a half decade earlier.

Second, the decision to limit "presumptive relief" to only the Top 20 television markets is highly arbitrary, ignoring that FCC precedent decries such DMA line-drawing. Moreover, missing from all of the studies in the record -- the FCC's latest set of peer reviewed studies, the earlier 2002 studies, and the empirical reviews filed by parties -- was any indication that the results were dependent on market size.

In modifying the radio/television cross-ownership rule in 1999, the FCC itself acknowledged that line-drawing based on DMAs is "unnecessary" to advance competition or diversity when a particular rule otherwise calls for an examination of "voices."[56] The FCC's

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[54] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). *See Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert. denied,* 506 U.S. 816 (1992). *See also Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). Even a statute, the validity of which depends on a premise supported at the time of enactment, becomes invalid subsequently if the predicate disappears. *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).

[55] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 1007 (1971), 403 U.S. 923 (1971), 406 U.S. 950 (1972).

[56] *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, Report and Order, 14 FCC Rcd 12903, 12949 (1999) ("*1999 Local Television Order*"), *recon.* 16 FCC Rcd 1067 (2000), *aff'd in part and*

initial liberalization of that rule had permitted, on a presumptive basis, mergers involving one TV, one AM, and one FM station in the Top 25 television markets, if post-merger at least 30 independently owned broadcast "voices" remained.[57] In 1999, the FCC removed the reference to market size, expressing concerns about its accuracy in accounting for levels of diversity and ability to reflect change.[58] Thus, even when local ownership regulation is warranted, line-drawing based on DMA rank is not.[59]

Further, data in the record on newspaper failures compelled relief outside the Top 20 markets. Prior to adoption of the *2008 Decision*, the Chairman had noted that at least 300 daily newspapers had ceased publication in the last 30 years.[60] More detailed data submitted in the

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remanded in part sub. nom., Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*").

[57] *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, Second Report and Order, 4 FCC Rcd 1741 (1989). In 1996, Congress extended the presumption to the Top 50 markets. Pub. L. No. 104-104, § 202(d), 110 Stat. 56, 112 (1996), as amended by Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

[58] The FCC explained its decision as follows:

> [A] rule based on the number of independent voices more accurately reflects the actual level of diversity and competition in the market . . . . [A] market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners, and a minimum number of alternative outlets available to advertisers . . . . In addition, unlike a rule based on market rank, our revised rule will account for changes in the number of voices in a market resulting from consolidation, the addition of new voices, or the loss of any outlets.

1999 Local Television Order, 14 FCC Rcd at 12949 (footnotes omitted).

[59] For different reasons, the FCC in 1982 repealed its "Top 50" policy, which had required an evidentiary hearing for those seeking to acquire additional VHF stations in the largest markets unless the applicant made a compelling public interest showing. The decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982). With repeal of the Top 50 policy and removal of DMA rank from the radio/television cross-ownership rule, the FCC's ownership rules, prior to the *2008 Decision*, had no longer been based on arbitrary references to DMA rank.

[60] FCC News Release, "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule," DOC-278113A1 (rel. Nov. 13, 2007) at 1.

record showed, however, that the majority of recent newspaper failures have occurred outside the Top 20 markets. For the period 1988 to 2006, of the 88 newspapers that completely ceased publication, 52 or roughly 60 percent were outside the Top 20 markets.[61] Additional data similarly demonstrated that, from 1976 to 2006, the overwhelming number of newspaper failures had occurred in very small population centers. In small towns of less than 25,000 residents, 179 papers went out of existence during those three decades, whereas population centers with over one million residents actually gained four papers; the record also showed all population tiers with less than one million residents lost newspapers during the period.[62] In light of this evidence, restricting presumptive relief to just the Top 20 DMAs was highly arbitrary.[63]

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[61] Data derived from the following: *Editor & Publisher International Yearbook 1989* at I-367; *Editor & Publisher International Yearbook 1990* at I-370; *Editor & Publisher International Yearbook 1991* at I-380; *Editor & Publisher International Yearbook 1992* at I-382; *Editor & Publisher International Yearbook 1993* at I-423; *Editor & Publisher International Yearbook 1994* at I-449; *Editor & Publisher International Yearbook 1995* at I-451; *Editor & Publisher International Yearbook 1996* at xxiv; *Editor & Publisher International Yearbook 1997* at xxiv; *Editor & Publisher International Yearbook 1998* at xxiv; *Editor & Publisher International Yearbook 1999* at xxiv; *Editor & Publisher International Yearbook 2000* at xxiv; *Editor & Publisher International Yearbook 2001* at xx; *Editor & Publisher International Yearbook 2002* at xx; *Editor & Publisher International Yearbook 2003* at xx; *Editor & Publisher International Yearbook 2004* at I-493; *Editor & Publisher International Yearbook 2005* at 490-I; *Editor & Publisher International Yearbook 2006* at I-455; *Editor & Publisher International Yearbook 2007* at I-445; *Broadcasting & Cable Yearbook 2007* at B-132 to B-215. This figure on newspaper failures did not include newspapers that cut back by converting from daily to weekly publication, merged with another newspaper, or became a "zoned edition" of another nearby newspaper; there is no reason to think that those curtailments would be any less prevalent in smaller markets.

[62] *MG Dec. 11, 2007 Comments* at Appendix I.

[63] Presumably ignoring this evidence in the record and in the *2008 Decision*, *see, e.g.*, at ¶¶ 27-33, that newspapers are facing adverse financial conditions, Objectors ask the FCC to make an even more regulatory change to the cross-ownership regime. In the *Petition*, at 6-7, they propose that television owners that purchase a local newspaper be required to submit a waiver request within one month of the acquisition and that the FCC act on the filing expeditiously. If the applicant cannot show that the acquisition serves the public interest, Objectors contend that the FCC should order the applicant to comply with the cross-ownership rule within one year. Objectors have provided no legal or credible factual support for this proposal, only anecdotal incidents that again play to their predilections. If, indeed, the FCC thinks such a significant change is needed to regulate newspaper acquisitions -- an area in which its jurisdiction is most, most tenuous -- it should put the proposal out for comment.

Third, use of the "eight-voices" limit in the presumptive waiver test is reminiscent of a formulation of the FCC's duopoly rule roundly discredited by the United States Court of Appeals for the District of Columbia in 2002 as arbitrary and capricious and remanded for corrections that the FCC has never made effective.[64] The *2008 Decision*'s approach to presumptive waivers does not correct these problems; it, in fact, compounds them.

The *2008 Decision* first borrows a Top 4 criterion from the duopoly rule, requiring that the television station that is to be cross-owned with a newspaper not be among the Top 4 ranked stations in its market. In the duopoly context, adoption of this Top 4 prong was based on promoting competition; the FCC reasoned that allowing merger of two of the Top 4 stations with their larger advertising bases might be anti-competitive.[65] As noted above, however, both the FCC and Third Circuit have recognized that newspapers and broadcast stations operate in separate product markets for antitrust analysis, and competitive concerns are no longer at issue in the newspaper/broadcast cross-ownership rule.

The *2008 Decision* also borrows the duopoly rule's requirement that eight independently owned and operating "major media voices" remain post-merger, limiting the count to television stations and newspapers. As the D.C. Circuit found in *Sinclair*, however, this approach arbitrarily and capriciously excludes other "voices." In that case, the court ruled that the duopoly rule was fatally flawed because of the FCC's unjustified failure to include the types of "voices" that it had found appropriate for inclusion in its simultaneous revision of the radio/television cross-ownership rule -- full-power commercial and noncommercial television, commercial and noncommercial radio, daily newspapers, and cable. The court found the difference in approach between the duopoly rule and the radio/television cross-ownership rule unacceptable: "Having found for purposes of cross-ownership that counting other media voices 'more accurately reflects

[64] *Sinclair*, 284 F.3d at 152, 169.

[65] *1999 Local Television Order*, 14 FCC Rcd at 12933-34.

the actual level of diversity and competition in the market' . . . the Commission never explains why such diversity and competition should not also be reflected in its definition of 'voices' for the local [television] ownership rule."[66] The court held that the FCC had "failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception is 'necessary in the public interest' under § 202(h) of the 1996 Act."[67] In this instance, the failure is even more pronounced. The newspaper/television cross-ownership directly deals with cross-ownership as did the radio/television cross-ownership rule that the *Sinclair* court used as a guide. The comparison and need for uniformity is even more direct than it was in the duopoly context.

Fourth, retention of any restriction on newspaper/broadcast cross-ownership is simply unconstitutional. The sole justification for deferential First Amendment review of the cross-ownership rule in 1978 -- the "scarcity doctrine" -- has been rendered obsolete by regulatory and technical changes.[68] In addition, since 1978 Congress has acted to limit the Commission's role in awarding new spectrum to broadcast licensees, further eliminating any principled basis for the "scarcity doctrine." Not eligible for deferential review, any newspaper/broadcast cross-ownership restriction cannot survive heightened constitutional scrutiny. In addition, any such restriction can no longer survive equal protection scrutiny because newspapers are the *only* non-broadcast media that remain subject to discriminatory cross-ownership restrictions.

V. CONCLUSION

Insofar as the *Petition* pertains to the permanent waivers that grandfathered the Media General cross-ownerships, it should be dismissed as untimely. The FCC does not have authority to entertain it. If the FCC somehow finds a reason to overlook this fatal deficiency, it should

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[66] *Sinclair*, 284 F.3d at 164.

[67] *Id.* at 165.

[68] *See, e.g.*, John W. Berresford, *The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, Media Bureau Staff Research Paper (March 2005).

deny the *Petition* because the FCC's analytic approach to the adjudicatory grandfathering decision was consistent with its own and court precedent. The result was also supported by ample factual evidence in the record. In addition, the FCC should reject Objectors' attacks on other aspects of the *2008 Decision* dealing with the newspaper/broadcast cross-ownership rule, a restriction that the FCC should have eliminated entirely since retaining it violates statutory standards and constitutional principles.

Respectfully submitted,

MEDIA GENERAL, INC.

By _____

John R. Feore, Jr.
M. Anne Swanson
Daniel A. Kirkpatrick

of

Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20036-6802
(202) 776-2534

May 6, 2008

know there are diverse views on this issue. We will try to work out an orderly procedure so that Members will be able to get their views out and considered in the Senate and do it in a timely way.

Again, I thank the two leaders and the Senator from Wyoming as well for his cooperation, as always.

The PRESIDING OFFICER. The majority leader is recognized.

UNANIMOUS CONSENT AGREEMENT—S.J. RES. 28

Mr. REID. Mr. President, I ask unanimous consent that, upon disposition of the House message on S. Con. Res. 70, the Senate proceed to the consideration of Calendar No. 731, S.J. Res. 28, a joint resolution disapproving the rule submitted by the FCC with respect to broadcast media ownership, the statutory time be reduced to 2 minutes equally divided and controlled between Senators DORGAN and STEVENS or their designees; that upon the use or yielding back of the time, the Senate proceed to vote on passage of the joint resolution; provided further that all remaining provisions of the statute remain in effect. I further ask that all statements relating to the matter be printed in the RECORD prior to the vote on this important piece of legislation.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. REID. Finally, as I understand, we have one more rollcall vote we are going to have now. There will be no votes tomorrow. This will be the last vote until Tuesday morning, unless someone has an objection.

The PRESIDING OFFICER. There is now 2 minutes equally divided prior to vote on a motion offered by the Senator from New Hampshire, Mr. GREGG, on discretionary spending.

The Senator from North Dakota.

Mr. CONRAD. Mr. President, under the budget resolution, spending goes down each and every year as a share of domestic product, 20.8 percent down to 19.1 percent

The Senator opposite seeks to make those reductions more steep and embrace the President's proposal which would eliminate the CORS Program—not just cut it but eliminate it, a program that puts 100,000 police on the street—cut the Weatherization Assistance Program 100 percent at a time of $120 oil; cut the first responder grants—police, fire, emergency medical 78 percent; cut community development 24 percent; cut clean water 21 percent; cut LIHEAP 15 percent.

More than that, because of the way this amendment has been written, this would put defense in the pool to be cut. If you want to do that, vote for the Senator's motion. I urge a "no" vote.

The PRESIDING OFFICER. The Senator from New Hampshire.

Mr. GREGG. Mr. President, I have no charts. I simply have a number: $1 trillion. We should draw the line somewhere around here. We should say to the American people: It is time that we exercise fiscal discipline. Let's do it at $1 trillion. That means that in this budget, you only have to reduce it 1 percent to get back underneath that number.

We don't have to look to the President to do that. We can't, amongst ourselves, come up with $10 billion of savings on a $1 trillion budget? If we can't, we should all go home.

Vote to draw the line at $1 trillion. Vote for the American taxpayer.

Mr. President, I yield back my time.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from New Hampshire, Mr. GREGG.

Mr. GREGG. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. DURBIN. I announce that the Senator from New York (Mrs. CLINTON) and the Senator from Illinois (Mr. OBAMA) are necessarily absent.

Mr. KYL. The following Senators are necessarily absent: the Senator from Tennessee (Mr. ALEXANDER), the Senator from Tennessee (Mr. CORKER), and the Senator from Arizona (Mr. MCCAIN).

Further, if present and voting, the Senator from Tennessee (Mr. ALEXANDER) would have voted "yea."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 47, nays 48, as follows:

[Rollcall Vote No. 135 Leg.]

YEAS—47

Allard	DeMint	Lugar
Barrasso	Dole	Martinez
Bayh	Domenici	McConnell
Bennett	Ensign	Murkowski
Bond	Enzi	Roberts
Brownback	Feingold	Sessions
Bunning	Graham	Shelby
Burr	Grassley	Smith
Cantwell	Gregg	Stevens
Chambliss	Hagel	Sununu
Coburn	Hatch	Thune
Cochran	Hutchison	Vitter
Coleman	Inhofe	Voinovich
Cornyn	Isakson	Warner
Craig	Klobuchar	Wicker
Crapo	Kyl	

NAYS—48

Akaka	Harkin	Nelson (FL)
Baucus	Inouye	Nelson (NE)
Biden	Johnson	Pryor
Bingaman	Kennedy	Reed
Boxer	Kerry	Reid
Brown	Kohl	Rockefeller
Byrd	Landrieu	Salazar
Cardin	Lautenberg	Sanders
Carper	Leahy	Schumer
Casey	Levin	Snowe
Collins	Lieberman	Specter
Conrad	Lincoln	Stabenow
Dodd	McCaskill	Tester
Dorgan	Menendez	Webb
Durbin	Mikulski	Whitehouse
Feinstein	Murray	Wyden

NOT VOTING—5

Alexander	Corker	Obama
Clinton	McCain	

The motion was rejected.

Mr. CONRAD. Mr. President, I move to reconsider the vote.

Mr. BAUCUS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Under the previous order, the Chair appoints. Mr. CONRAD, Mrs. MURRAY, Mr. WYDEN, Mr. GREGG, and Mr. DOMENICI conferees on the part of the Senate.

DISAPPROVAL OF FCC OWNERSHIP RULE SUBMITTAL

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of S.J. Res. 28, which the clerk will report.

The legislative clerk read as follows:

A resolution (S.J. Res. 28) disapproving the rules submitted by the Federal Communications Commission with respect to broadcast media donorship.

The PRESIDING OFFICER. There is 2 minutes equally divided. The Senator from North Dakota is recognized.

Mr. DORGAN. This is a resolution of disapproval of an FCC rule dealing with media ownership. The Commerce Committee has passed this out to the floor of the Senate. I will not go into great length on the merits of the issue except to say we have visited this issue previously. I think there is too much concentration in the media. The FCC rule moves in exactly the wrong direction, adding more concentration.

I ask that Members of the Senate who wish to would be able to make statements that appear prior to this vote. I believe we have agreed to a voice vote.

I yield the floor. I reserve my time.

The PRESIDING OFFICER. The Senator from Alaska is recognized.

Mr. STEVENS. I yield to the Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I know we are going to have a voice vote. I ask unanimous consent I be recorded as a "no."

The PRESIDING OFFICER. The record will so reflect.

Mr. ISAKSON. Mr. President, I wish the record also to reflect I voted "no" on S.J. Res. 28.

Mr. STEVENS. I ask unanimous consent statements in opposition to the resolution of the Senator from North Dakota be printed in the RECORD at this point.

The PRESIDING OFFICER. Without objection, it is so ordered.

CROSS OWNERSHIP RULE

Mr. WEBB. Mr. President, I rise today to thank my colleague from North Dakota for his work on media ownership issues and to engage him in a colloquy to clarify one point about the resolution of disapproval. I note that Senator DORGAN has long been a champion of media localism and diversity, issues that are quite important to me as well.

Because I believe that the Federal Communications Commission ignored Congress's repeated admonitions about following appropriate processes in reaching the agency's new cross-ownership rules, I support this bipartisan resolution.

Yet I believe that if the Senate adopts this resolution, the existing waivers contemplated under the FCC cross-ownership rule should be protected. This means that those waivers would not be a part of this resolution.

I have significant concerns that if these waivers are not protected, this legislation could harm some media markets and constituents' access to news and information in my State of Virginia.

I would like to confirm that this resolution, while it would nullify the revised version of the FCC's newspaper cross-ownership ban, would not undo or in any manner change the FCC's decision to grant permanent waivers to five existing newspaper-broadcast combinations, and thus grandfather them, as set forth in paragraphs 77 and 158 of the FCC's December 18, 2007 Report and Order. It is my understanding that this resolution will not affect these five specific waivers, and I would like to clarify this understanding

Senator DORGAN, is it your goal and understanding that the waivers that the FCC granted in conjunction with the cross-ownership rule be protected?

Mr. DORGAN. Under the Congressional Review Act, the resolution of disapproval is intended to overturn a specific rule, not other parts of an agency's order. The waivers are not rules.

The resolution is written in a specific way referring to an order, but it is the rule that is nullified. These waivers could have been granted alone or under the previous cross-ownership ban. It is not the intention of this resolution to affect the waivers in the order.

Ms. SNOWE. Mr. President, I rise today in strong support of the resolution of disapproval that repeals the recent Federal Communications Commission's media ownership rulemaking.

As an original cosponsor of this measure, I applaud Senator DORGAN for once again taking the lead in introducing critical legislation to overturn a misguided attempt by the commission to relax crucial media ownership rules—a move that will only lead to further consolidation within the industry that will ultimately harm consumers.

As my colleagues are well aware, consolidation in the media market has led to fewer locally owned stations, and less local programming and content. Indeed, it speaks volumes that the number of independent radio owners has plunged in the past 11 years by 39 percent.

Just in 1996 and 1997 alone, more than 4,400 radio stations were sold following the first round of consolidation following passage of The Telecommunications Act of 1996. Between 1995 and 2003, ownership of the top 10 largest television stations increased from 104 owners to 299 owners.

At the same time, we know that locally owned stations aired more local news and programming than non-locally owned stations—and that is not just me talking. That is according to the FCC's own studies, which also found that smaller station groups overall tended to produce higher quality newscasts compared to stations owned by larger companies.

So there should be no mistake—fewer independent, local stations mean less local content and programming.

Minority and women-ownership of media outlets are also at perilously low levels—currently only 6 percent of full-power commercial broadcast radio stations are owned by women and 7.7 percent are owned by minorities. Ownership of broadcast television is even lower—5 percent for women and only 3.3 percent for minorities. Instead of being a catalyst promoting localism and ownership diversity, the FCC's action will actually hasten the decline in these crucial areas.

The Senate Committee on Commerce, Science, and Transportation last fall held a hearing to consider these very issues, and the actions required for improvement. During that hearing, I and several of my colleagues voiced strong concern about Chairman Martin's intent to ease current media ownership rules, particularly because of the potential impact on localism and diversity in broadcasting.

That is why I, along with many committee members, joined Senators DORGAN and LOTT in introducing The Media Ownership Act of 2007, which was reported out of the committee favorably in December. This constitutes yet another step in the mounting opposition to the loosening of these crucial rules. We had hoped that Chairman Martin would heed not only our urgings, but the concerns expressed by the American public, and complete the 4-year-old rulemaking on localism.

However, on November 13, less than a week after that hearing, the Chairman issued a new proposal to lift the 32-year-old newspaper-broadcast cross-ownership ban in the top 20 media markets. Worse still, the FCC allowed only 28 days for the public to comment on the proposal when it has historically provided 60 to 90 days on pivotal matters such as this.

Clearly, the FCC's actions demonstrate a litany of highly-misguided priorities that neglect to consider the full impact of the FCC's rule change on the American people. Therefore, this resolution of disapproval is necessary to rescind this haphazard approach.

I must say it feels a little like déjà vu all over again, when nearly 5 years ago the FCC attempted a similar effort to relax another set of media ownership rules. And fittingly, the opposition to the commission's attempt then mirrors the opposition that is coalescing now. And the action we are considering now is reminiscent of the joint resolution passed by the U.S. Senate in September 2003, which I cosponsored, condemning the Commission's efforts to rewrite those rules.

So that naturally begs the question—why would the commission continue to attempt to weaken media ownership rules when the American public has vociferously opposed these efforts time and again? When the U.S. Congress in 2004 enacted a statute prohibiting the FCC from raising national ownership limits above 39 percent? When the Third Circuit Court of Appeals rejected as arbitrary and capricious this attempt at revising the rules after finding the FCC had no factual basis for the limits it set? We deserve an answer.

Many proponents for relaxing media ownership rules have pointed to the precipitous decline of the newspaper industry as the reason change is mandatory. They have even cited a recent report by the Newspaper Association of America, NAA, which found print ad revenue for the industry fell by 9.4 percent last year—the biggest decline since it started keeping records in 1950.

However, what these proponents are neglecting to mention is that the NAA also found that online newspaper advertising revenue increased 19 percent last year.

Furthermore the NAA president and CEO John Sturm stated "newspaper publishers are continuing to drive strong revenue growth from their increasingly robust Web platforms." This hardly sounds like an industry in irreversible peril if this longstanding rule remains in place.

Opponents of this resolution will also argue that the FCC crafted a very narrow revision, lifting the cross-ownership ban for only the top 20 media markets, so this resolution is unnecessary. However, the FCC also adopted "four factors" and two broad "special circumstances" that would allow this ban to be lifted for a station in any media market.

These scenarios and factors include evaluating financial condition, possible increased local news, as well as existing market media concentration, and news independency. Given the vagueness and loopholes that exist with the rulemaking the "high hurdle" that the Commission has supposedly set for proposed combinations could be easily cleared by using only a stepladder.

Preventing further media consolidation has been a bipartisan effort, and the resolution before us today is no different. We must not allow the indispensable role the media plays in promoting diversity and localism to be further marginalized and miniaturized by unchecked consolidation within the industry.

We owe it to the American people to restore confidence in the FCC's commitment not only to uphold the public interest but to advance it and strengthen it. That is why it is undeniably incumbent upon the commission members to revisit these rules and establish a set of standards that will effectively promote localism and minority and women-ownership, not more media consolidation. I urge my colleagues to support this resolution.

Mr. MENENDEZ. Mr. President, today we are considering a critical